

CC TO JUDGE KJ

The Honorable Robert S. Lasnik  
United States District Court Judge



CV 00-01227 #00000028

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AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
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BY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PATRICK T. ROCHA,

Plaintiff,

) No. C00-1227L

v.

CITY OF SEATTLE, et al.,

Defendants.

) CITY DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OF DISMISSAL

) NOTE ON MOTION CALENDAR  
FRIDAY, OCTOBER 19, 2001

I. INTRODUCTION

Albert Einstein once said that "everything should be made as simple as possible, but not simpler." Following is our attempt to do just that. On July 21, 1997, around 1:00 p.m., plaintiff Rocha and a weekend acquaintance dined at the Hana Restaurant in Seattle. Over a period of six hours, plaintiff ordered food. He ate the food. He could not and did not pay for the food. As a result, he was arrested for theft, simply because he could not and did not pay for food he ordered and ate.

Based on this arrest, plaintiff filed suit against nine defendants: retired Police Chief Norm Stamper, Seattle Police Officers Peter Huff, Jim Frese, and Micheline Kane, and the City of Seattle (collectively "City Defendants"), as well as four King County defendants. However, plaintiff cannot present any evidence to dispute the fact that Seattle Police officers had probable cause to arrest him for theft. Plaintiff's claims against the City

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1 Defendants therefore fail as a matter of law. Moreover, plaintiff's § 1983 claim against the  
2 City of Seattle fails because he is unable to demonstrate that a policy or custom of the City  
3 caused the alleged wrong. In any event, the individual City Defendants are entitled to  
4 qualified immunity.

5

6                   II. RELIEF REQUESTED

7                   The City of Seattle, retired Police Chief Norm Stamper, and Seattle Police Officers  
8 Peter Huff, Jim Frese, and Micheline Kane (collectively "City Defendants"), pursuant to Civil  
9 Rule 56, request that the Court grant their Motion for Summary Judgment of Dismissal and  
10 dismiss plaintiff's Complaint with prejudice.

11

12                  III. STATEMENT OF FACTS

13                  In mid July 1997, Rocha traveled by Greyhound from Texas to Washington to visit  
14 his sister. See Exhibit A (Deposition Excerpts of Rocha) attached to Declaration of Tobin  
15 Dale; p. 8, l. 4-6, 13. On July 19, 1997, Rocha participated in a "rave," pulled an all nighter,  
16 and met for the first time a fellow named "Granville" in a bar. *Rocha Dep.*, p. 47, l. 15-24; p  
17 49, l. 1-4. On the day of his arrest, Rocha and his new acquaintance Granville made their  
18 way to the Hana Restaurant ("Hana's") in Seattle for some lunch. *Rocha Dep.*, p. 53, l. 5-8

19                  At approximately 1:00 p.m., on July 21, 1997, Rocha and Granville arrived at  
20 Hana's. See Exhibit B (incident report) attached to Dale Decl. Before ordering food, Rocha  
21 knew that he could not pay for the food:

22                  Q: Is it safe to assume that when you arrived at the Hana restaurant you  
23 realized that if Granville didn't pay, you couldn't pay?

24                  A: I told him that I couldn't.

25                  Q: And you knew that you couldn't pay, correct?

26                  A: Correct.

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1           Rocha Dep., p 53, l. 20-25. Nevertheless, Rocha ordered food, ate the food, and drank a  
 2 "couple" of beers. He had no complaints about the service or food at Hana's   *Rocha Dep.*,  
 3 p. 54, l. 20-25; p 55, l. 1-8.

4           When the bill came, neither could pay for it   Granville's credit card was declined,  
 5 and Rocha only had \$0.25 available to pay the bill   *Rocha Dep.*, p 56, l. 1-23, Exhibit B  
 6 attached to Dale Decl. After Granville placed a phone call, he left without paying and did  
 7 not return.   *Rocha Dep.*, p 56, l. 24-25; p 57, l. 17-21. During his six-hour stay at Hana's,  
 8 Rocha made one attempt to obtain money. he placed one phone call one time to his sister  
 9   *Rocha Dep.*, p. 59, l. 13-16, 19-21; Exhibit B attached to Dale Decl. Rocha explained how  
 10 the rest of his time was spent:

11           Q:   What were you guys doing between the time you were presented with  
 12 the bill and the time Granville left the restaurant?

13           A:   Sitting at the table watching people walk up and down Broadway.  
 14   *Rocha Dep.*, p 58, l 14-18. After six hours at Hana's, and after warning Rocha to pay up or  
 15 the police would be called, Hana's manager called the Seattle Police.   *Rocha Dep.*, p. 59, l  
 16 2-6; Exhibit B to Dale Decl

17           At approximately 7:10 p.m., Seattle Police Officers Kane and Frese responded to  
 18 Hana's. Upon arrival, the officers were informed by the complaining witness, waitress Anne  
 19 Monroe, that Rocha and a companion had consumed \$37.53 worth of food and had not and  
 20 could not pay. Admittedly, Rocha only had \$0.25 available to pay the bill   Further, the  
 21 officers were informed that Rocha and his companion had been in the restaurant since 1:00  
 22 p m (i e., about six hours). See Exhibit B to Dale Decl

23           Rocha informed the officers that a half hour before their arrival Granville went to the  
 24 Western Union, just three doors down, to get some money wired. The officers contacted  
 25 Western Union to see if anyone matching Granville's description had been seen, but no  
 26 one had.   *Rocha Dep.*, p. 63, l. 6-25; p. 64, l. 1-2, see also Exhibit B to Dale Decl.

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1       Armed with the facts that (1) Rocha consumed food, (2) Rocha did not have money  
2 to pay for the food; and (3) his companion had left but had not returned, Officers Kane and  
3 Frese exercised their discretion to place Rocha under arrest for theft. This arrest was  
4 screened by Sergeant Huff. Following his arrest, Rocha was booked into the King County  
5 Jail. See Exhibit B to Dale Decl. These charges were later dismissed for "proof problems"  
6 Dale Decl., ¶ 3.

7       At no time did any Seattle Police officer ever make any comment to Rocha about his  
8 out-of-state citizenship, or Texas residence *Rocha Dep.*, p. 72, l. 21-25; p. 73, l. 1-5  
9 Rocha claims his only financial loss to be "three or four ferry tickets." *Rocha Dep.*, p. 70, l.  
10 8-11 Rocha did not sustain any physical injuries as a result of his arrest and detention  
11 *Rocha Dep.*, p. 71, l. 13-15.

12       During his deposition, Rocha explained why he was arrested:

13       Q. . . . But can you tell me just briefly what your understanding is of why  
14 you were arrested?

15       A: Because I lacked sufficient funds to pay the bill at the restaurant and  
16 was actually waiting for my companion to return with the money to pay the  
bill.

17 *Rocha Dep.*, p. 9, l. 18-23.

18                          IV. STATEMENT OF ISSUES

19       Whether plaintiff's claims against City Defendants should be dismissed when there  
20 was probable cause for plaintiff's arrest, when plaintiff cannot demonstrate that his  
21 damages were proximately caused by any policy or practice of the City of Seattle, and  
22 when the individual officers are entitled to qualified immunity.

23                          V. EVIDENCE RELIED UPON

24       City Defendants rely upon the declaration of Tobin Dale, the Deposition (excerpts) of  
25 Patrick Rocha, and the files and records of this matter.

26  
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## **VI. AUTHORITY AND ARGUMENT**

A defendant in a civil action is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" show that the matter does not involve any genuine issue of material fact. Fed. R Civ. P 56(c) The moving party need only demonstrate that there is an absence of evidence supporting an element essential to the non-moving party's claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S Ct. 2548 (1986) Once the moving party meets its burden, the burden shifts to the non-moving party to produce "specific facts showing that there is a genuine issue for trial." Id. That is, the non-moving party "must present significant probative evidence tending to support its claim or defense." Richards v Neilsen Freight Lines, 810 F.2d 898, 902 (9<sup>th</sup> Cir. 1987). The non-moving party may not rely merely on conclusory allegations, speculative statements or argumentative assertions, but must produce independent evidence showing that a genuine issue exists. Fed. R Civ. P 56(e)

**A. PLAINTIFF'S CLAIMS AGAINST CITY DEFENDANTS FAIL AS A MATTER OF LAW.**

Plaintiff advances four<sup>1</sup> claims against the City Defendants for violations under the (1) Fourth Amendment ("Lack of Probable Cause"); (2) Fourteenth Amendment ("Equal Protection Clause"); (3) the "privileges and immunities clauses"; and (4) under 42 U.S.C. §1983 (discussed in the following Section B). None of these claims can survive summary judgment, as the plaintiff lacks evidence to support his claims, and as the officers had probable cause to arrest him for theft.

<sup>1</sup> Plaintiff mistakenly brings a "Seventh Cause of Action" for attorney fees under § 1988 "Section 1988 is merely procedural in nature and does not create an independent cause of action" Torrey v. Tukwila, 76 Wn App. 32, 39, 882 P.2d 799 (1994)

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1       1     Plaintiff's Fourth Amendment Claim is defeated by Probable Cause

2              Plaintiff alleges that City Defendants "effected an unreasonable search and seizure"<sup>2</sup>  
 3 without authority of law in violation of the Fourth Amendment" when he was arrested for  
 4 theft – after he ate food for which he did not pay. See Complaint, p. 7, l. 14-15.

5              However, probable cause is a complete defense to plaintiff's Fourth Amendment  
 6 claim See e.g., Hennick v. Bowling, 115 F.Supp. 2d 1204, 1207 (W.D. Wash. 2000)(where  
 7 "probable cause existed, no triable issue of fact exists on plaintiff's Fourth Amendment  
 8 claims"), United States v. Smith, 790 F 2d 789, 792 (9<sup>th</sup> Cir. 1986) A warrantless arrest  
 9 does not violate the Fourth or Fourteenth amendments if the police officers had probable  
 10 cause to believe an individual had committed or was about to commit a crime See e.g.,  
 11 United States v. Del Vizo, 918 F.2d 821, 825 (9th Cir. 1990) (Fourth Amendment); Albright  
 12 v. Oliver, 510 U S. 266, 274-75 (1994) (Fourteenth Amendment).

13              Probable cause for a warrantless arrest exists when the facts and circumstances  
 14 within the arresting officer's knowledge are sufficient to cause a person of reasonable  
 15 caution to believe that a crime has been committed. Ybarra v. Illinois, 444 U.S. 85, 91  
 16 (1979); State v. Rogers, 70 Wn. App. 626, 632, 855 P.2d 294, *review denied*, 123 Wn 2d  
 17 1004, 868 P 2d 872 (1993). The validity of an arrest is determined by objective facts and  
 18 circumstances known to the officer at the time of arrest. Beck v. Ohio, 379 U S 89, 96  
 19 (1964); State v. Huff, 64 Wn. App 641, 645-46, 826 P 2d 698 (1992); State v. Fore, 56 Wn  
 20 App. 339, 783 P.2d 626 (1989). "It is immaterial whether or not the [arrestee] was actually  
 21 violating the law at the time of the arrest if in fact his conduct was such as to lead a  
 22 reasonable prudent officer to believe in good faith he was violating the law" Sennett v.  
 23 Zimmerman, 50 Wn.2d 649, 651, 314 P.2d 414 (1937), *citing Coles v. McNamara*, 136  
 24 Wash 624, 627, 241 Pac. 1 (1925).

25              <sup>2</sup> With respect to City Defendants, it is assumed that plaintiff's alleged "search" was the  
 26 "frisk" incident to his arrest and that the alleged "seizure" was his arrest for theft.

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1 Police officers may also conduct a warrantless search and seizure incident to a  
 2 lawful arrest:

3 When an arrest is made, it is reasonable for the arresting officer to search the  
 4 person arrested in order to remove any weapons that the latter might seek to  
 5 use in order to resist arrest or effect his escape. Otherwise, the officer's  
 6 safety might well be endangered, and the arrest itself frustrated. In addition, it  
 7 is entirely reasonable for the arresting officer to search for and seize any  
 8 evidence on the arrestee's person in order to prevent its concealment or  
 9 destruction.

10 Chimel v. California, 395 U.S. 752, 762 (1969).

11 Furthermore, it well-established that "[w]here an officer has legal grounds to make  
 12 an arrest he has considerable discretion to do so." See e.g., McBride v. Walla Walla  
 13 County, 95 Wn. App. 33, 39, 975 P.2d 1029 (1999). "An officer or police agency who elects  
 14 an option that is permissible under state and/or federal law does not violate civil rights  
 15 simply because there was a less intrusive and equally permissible option available." Torrey  
 16 v. Tukwila, 76 Wn. App. 32, 44, 882 P.2d 799 (1994).

17 In this case, Officers Kane and Frese exercised their discretion to place Rocha  
 18 under arrest for prima facie theft. Probable cause clearly existed for this arrest under SMC  
 19 12A.08.060.<sup>3</sup> In other words, based on undisputed facts, *reasonable prudent officers could*  
 20 *believe that Rocha had violated SMC 12A.08.060*. At the scene, the officers were informed  
 21 by the Hana's waitress that Rocha and his weekend acquaintance had consumed \$37.53  
 22 worth of food and had not and could not pay. Admittedly, Rocha knew – prior to ordering  
 23 food – that if his acquaintance did not pay he could not pay. See Rocha Dep., p. 53, l. 20-  
 24 25 Admittedly, Rocha only had \$0.25 available to pay the bill. Further, the officers were  
 25 informed that Rocha and his acquaintance had been in the restaurant since 1:00 p.m. (i.e.,

26

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27 <sup>3</sup> Under SMC 12A.08.060(A)(2), "A person is guilty of theft if: . . . (2) By deception or by  
 28 other means to avoid payment for services, he intentionally obtains services which he  
 29 knows to be available only for compensation.

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1 about six hours). See Exhibit B to Dale Decl. During these six hours, Rocha made only  
 2 one (1) attempt to obtain money: he placed one phone call one time to his sister. He made  
 3 no other attempts to arrange for payment. *Rocha Dep.*, p. 59, l. 13-16, 19-21; p. 61, l. 7-10

4       Although having no legal obligation to do so, these officers also went an additional  
 5 step by attempting to verify Rocha's story, regarding Granville's attempts to pay. Per  
 6 Rocha, Granville left a half hour before the officers' arrival to get some money at the  
 7 Western Union, just three doors down. The officers contacted Western Union to see if  
 8 anyone matching Granville's description tried to obtain money; they were informed no one  
 9 had. *Rocha Dep.*, p. 63, l. 6-25; p. 64, l. 1-2, Exhibit B to Dale Decl.

10     Clearly, under these facts, the officers had probable cause to believe Rocha had  
 11 committed theft by consuming food for which he did not have the ability to pay. Having  
 12 probable cause, Officers Kane and Frese exercised their discretion to place Rocha under  
 13 arrest. Rocha was only "frisked" incident to his arrest. *Rocha Dep.*, p. 62, l. 16. This arrest  
 14 was screened by Sgt. Huff. Because Officers Kane, Frese, and Huff had probable cause to  
 15 arrest for theft, plaintiff's Fourth Amendment claims are barred

16     2. Rocha's Residence played No Role in His Arrest: His Fourteenth Amendment  
 17 and "Privileges and Immunities" Claims Fail.

18     Plaintiff attempts to allege both an "equal protection" claim under the 14<sup>th</sup>  
 19 Amendment, as well as a claim for "violation of the privileges and immunities"<sup>4</sup> clauses  
 20 contained in Article IV, Section 2," based on "disparate treatment" due to his Texas  
 21 citizenship. See Complaint, p. 6. For three reasons, these claims fail.

22     First, in the event this claim is based on Rocha's "warrantless" arrest, this claim is  
 23 barred by probable cause (as discussed in detail above). That is, a warrantless arrest does  
 24 not violate the Fourteenth Amendment if the officers had probable cause to believe an

25     4 Article IV, Section 2, of the United States Constitution provides "The Citizens of each  
 26 State shall be entitled to all Privileges and Immunities of Citizens in the several States."

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1 individual had committed or was about to commit a crime. See e.g., Albright v. Oliver, 510  
 2 U.S. 266, 274-75 (1994). Further, the officers had considerable discretion in deciding to  
 3 arrest Rocha See e.g., McBride, 95 Wn App. at 39 ("Where an officer has legal grounds  
 4 to make an arrest he has considerable discretion to do so")

5 Second, this claim is barred because plaintiff has failed to state an equal protection  
 6 claim. To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection  
 7 Clause of the Fourteenth Amendment, plaintiff must show that the City Defendants acted  
 8 with an intent or purpose to discriminate against the plaintiff based upon membership in a  
 9 protected class. See Arlington Heights v. Metropolitan Housing Development Corp., 429  
 10 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show  
 11 a violation of the Equal Protection Clause"); Barren v. Harrington, 152 F.3d 1193, 1194 (9<sup>th</sup>  
 12 Cir. 1998) (purposeful discrimination is an essential element of an equal protection claim)

13 In this case, there is absolutely no evidence of "purposeful discrimination" to arrest  
 14 Rocha because he was a Texas resident. In fact, Rocha testified during his deposition that  
 15 he was arrested for not paying for his food, not for being a Texan:

16 Q: . . . But can you tell me just briefly what your understanding is of why  
 17 you were arrested?

18 A: Because I lacked sufficient funds to pay the bill at the restaurant and  
 19 was actually waiting for my companion to return with the money to pay the  
 bill.

20 *Rocha Dep.*, p. 9, l. 18-23.

21 The officers made no comments regarding his out-of-state residency:

22 Q: Right. I'm just talking about the Seattle Police Department officers  
 23 during your time in the Hana restaurant or any time thereafter, did they make  
 any comment at all about your residence?

24 A: When I produced by Texas I.D. and I think I basically asked them,  
 25 you know, if this is the way they treat all of their tourists.

26 Q. And what did they say?

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1 A: I don't remember. I think it was kind of a – more of a barb on my point.  
2 **And they just let it go.**

3 Q: When you were arrested, did they tell you why you were being  
arrested?

4 A: On suspicion of theft.

5 Q: Did they say anything else?

6 A: Not that I can remember, other than what I've already told you.

7 *Rocha Dep.*, p. 72, l. 21-25; p. 73, l. 1-11. (emphasis added).

8 Without evidence of any "purposeful discrimination" to arrest Rocha for theft  
9 because he was a Texan, plaintiff's equal protection claim fails as a matter of law  
10 Moreover, these claims blatantly ignore the admitted, undisputed facts that Rocha ordered  
11 and ate food for which he could not and did not pay. In the spirit of Albert Einstein's words  
12 invoked earlier, the plain and simple truth is that this is *prima facie* theft under SMC  
13 12A.08.060, whether one is from Texas or Tacoma

14 Finally, even had plaintiff stated an equal protection claim, it would fail because the  
officers are entitled to qualified immunity (as discussed later in Section C).

16 **B. PLAINTIFF DOES NOT HAVE A CLAIM AGAINST CITY DEFENDANTS UNDER  
17 42 U.S.C. § 1983 FOR VIOLATIONS OF CIVIL RIGHTS.**

18 1. City Defendants retired Police Chief Stamper and Seattle Police Officers  
19 Peter Huff, Jim Frese, and Micheline Kane did not deprive plaintiff of any civil  
rights, and plaintiff is therefore unable to maintain a § 1983 action.

20 42 U.S.C. § 1983 ("§ 1983") does not apply in the absence of a federal constitutional  
21 violation. "Section 1983 is not itself a source of substantive rights," but merely provides "a  
22 method for vindicating federal rights elsewhere conferred." Graham v. Conner, 490 U.S.  
23 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), quoting in part Baker v. McCollan, 443 U.S.  
24 137, 144, n.3, 99 S Ct. 2689, 61 L.Ed.2d 433 (1979). Consequently, for plaintiff to have  
25 standing to maintain a § 1983 claim, he must first demonstrate that the officers deprived  
26 him of a right secured by the Constitution and the laws of the United States. Flagg

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1 Brothers, Inc. v. Brooks, 436 U.S. 149, 155, 98 S Ct. 1729, 56 L.Ed.2d 185 (1978); Wood v.  
 2 Ostrander, 879 F.2d 583, cert. denied, 498 U.S. 938 (9th Cir. 1989), American Legion Post  
 3 No. 32 v. City of Walla Walla, 116 Wn.2d 1, 12, 802 P.2d 784 (1991)

4 Here, there is absolutely no evidence that any of the City Defendants violated any of  
 5 plaintiff's rights, including his rights under the 4<sup>th</sup> Amendment, the 14<sup>th</sup> Amendment, or  
 6 under the "privileges and immunities clauses." Plaintiff is therefore unable to make the  
 7 necessary threshold showing, and thus any § 1983 claim must be summarily dismissed

8 Furthermore, as a matter of law, plaintiff cannot bring a § 1983 claim against retired  
 9 Police Chief Norm Stamper. Chief Stamper had no contact or involvement whatsoever with  
 10 the arrest and subsequent prosecution of this plaintiff. Without personal participation, Chief  
 11 Stamper cannot be held liable. See Rizzo v. Goode, 423 U.S. 362 (1976).

12 2. Defendant City's conduct did not rise to the level of an officially sanctioned  
 13 policy or practice, and therefore any civil rights claim must fail

14 Assuming, *arguendo*, that City Defendants' conduct constituted a violation of  
 15 plaintiff's constitutional rights, his § 1983 claims against the City should be dismissed.  
 16 Plaintiff has not and cannot set forth facts establishing an official policy or custom on the  
 17 part of the City of Seattle to support a claim of liability under § 1983. Moreover, even if a  
 18 policy or custom is unearthed by plaintiff, he is unable to make the requisite causal showing  
 19 between the municipal policy and the alleged wrongdoing by the City Defendants sufficient  
 20 to support a constitutional claim under § 1983.

21 The leading case on the municipal liability under § 1983 is Monell v. Dept. of Social  
 22 Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

23 In Monell, . . . we decided that a municipality can be found liable under § 1983  
 24 only where the municipality itself caused the constitutional violations at issue.  
 25 Respondeat superior vicarious liability will not attach under § 1983. It is only  
 when the execution of the government's policy or custom . . . inflicts the injury  
 that the municipality may be held liable under § 1983. Thus our first inquiry in  
 any case alleging municipal liability under § 1983 is the question of whether

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1 there is a direct causal link between the municipality or custom, and the  
 2 alleged constitutional deprivation.

3 City of Canton, Ohio v. Harris, 489 U.S. 378, 385, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989).  
 4 A municipality may not be held liable under § 1983 merely because the plaintiff has  
 5 suffered a deprivation of federal rights at the hands of a municipal employee. Bryan  
6 County Commissioners v. Brown, 520 U.S. \_\_\_, 117 S. Ct. 1382, 1389, 137 L.Ed.2d 626  
 7 (1997). Instead, the plaintiff must identify a municipal policy or custom which itself caused  
 8 the plaintiff's injury. Id. at p. 1388. The existence of a policy or custom for purposes of a  
 9 constitutional action cannot be established solely on the occurrence of a single incident of  
 10 unconstitutional action by a non-policymaking employee Oklahoma City v. Tuttle, 471 U.S.  
 11 808, 105 S. Ct. 2427, 85 L.Ed.2d 791 (1985), Davis v. Ellensburg, 869 F.2d 1230 (9th Cir.  
 12 1989).

13 As noted above, Rocha's claim depends on a finding that he was arrested for being  
 14 a Texas resident. There is absolutely no evidence that Texans or other "foreigners" are  
 15 routinely arrested in Seattle – unless they commit recognized crimes. There is no evidence  
 16 whatsoever beyond the facts of this case that suggest that any policy or custom on the part  
 17 of the City of Seattle proximately caused a violation of plaintiff's constitutional rights.  
 18 Where, as here, the entire case is based upon one incident, plaintiff's civil rights claims  
 19 against the City must be dismissed.

20 **C. QUALIFIED IMMUNITY BARS ALL OF PLAINTIFF'S CLAIMS.**

21 Police officers are entitled to qualified immunity from suit for claims based upon their  
 22 official actions. Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396  
 23 (1982); Smiddy v. Varney, 665 F.2d 261 (9<sup>th</sup> Cir. 1981). Qualified immunity is "an  
 24 entitlement not to stand trial or face other burdens of litigation" Mitchell v. Forsyth, 472  
 25 U.S. 511, 526 (1985). In order to defeat this qualified immunity defense, plaintiff Rocha  
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1 must clear three distinct hurdles to avoid dismissal – which he cannot clear. He must  
 2 (1) identify a specific federal right allegedly violated by the conduct of defendants; (2) prove  
 3 that the right was "clearly established" at the time of the violation; and (3) prove that no  
 4 reasonable police officer could have believed that the actions were lawful, in light of the  
 5 facts and circumstances known to the officer or public official. See Altshuler v. Seattle, 63  
 6 Wn. App. 389, 394, 819 P.2d 393, citing, Davis v. Scherer, 468 U.S. 183, 197, 104 S. Ct.  
 7 3012, 82 L.Ed.2d 139 (1984); Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86  
 8 L.Ed.2d 411 (1985), Romero v. Kitsap County, 931 F.2d 624, 627 (9<sup>th</sup> Cir. 1991). The  
 9 failure to meet any of these elements defeats the claim.

10 If the plaintiff can prove a violation of a "clearly established right," he must still show  
 11 the police officer's actions were not "objectively reasonable" considering the circumstances  
 12 and in light of the knowledge the officer possessed at the time. The qualified immunity  
 13 standard "gives ample room for mistaken judgments" by protecting "all but the plainly  
 14 incompetent or those who knowingly violate the law." Hunter v. Bryant, 502 U.S. 224, 227,  
 15 112 S. Ct. 534, 537, 116 L.Ed.2d 589 (1991), citing Malley v. Briggs, 475 U.S. 335, 343,  
 16 106 S. Ct. 1092, 1097, 89 L.Ed.2d 271 (1986); Mills v. Graves, 930 F.2d 729, 731 (9<sup>th</sup> Cir.  
 17 1991). In a case involving a question of whether probable cause existed to support an  
 18 action, "the case should not be permitted to go to trial if there is any reasonable basis to  
 19 conclude that probable cause existed." Cross v. City of Des Moines, 965 F.2d 629, 632 (8<sup>th</sup>  
 20 Cir. 1992), citing Hunter v. Bryant, 502 U.S. at 227, 112 S. Ct. at 536. It is of no  
 21 consequence to a determination of qualified immunity that probable cause to arrest did not  
 22 in fact exist. Fuller v. M.G. Jewelry, 950 F.2d 1437, 1443 (9<sup>th</sup> Cir. 1991), citing, Anderson v.  
 23 Creighton, 483 U.S. 635, 641, 107 S. Ct. 3034, 3039, 97 L.Ed.2d 523 (1987).

24 The standard for common law qualified immunity is essentially the same as that for §  
 25 1983 qualified immunity. The only significant distinction is the nomenclature used to  
 26

CITY DEFENDANTS' MOTION FOR  
 SUMMARY JUDGMENT OF DISMISSAL - 13

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describe each. Pursuant to Guffey v. State, 103 Wn.2d 144, 690 P.2d 1168 (1984), an officer is entitled to common law qualified immunity from liability "for false arrest and imprisonment when the officer (1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably" Id. at 152.

In this case, plaintiff cannot clear the three hurdles of qualified immunity to avoid dismissal. He has not (1) identified a specific federal right allegedly violated by the defendants; or (2) proven that this right was "clearly established" at the time of violation, or (3) proven that no reasonable police officer could have believed that the actions were lawful, in light of the facts and circumstances known. Furthermore, plaintiff must – and cannot – show that the actions of any of the City Defendants were not "objectively reasonable," considering all of the circumstances.

Here, plaintiff's own actions and statements gave the police officers probable cause to arrest him for theft; he ordered and ate food for which he could not and did not pay. Plaintiff is unable to present any evidence, whatsoever, to put into dispute the existence of probable cause (as discussed in detail in Section A.1). Therefore, the City Defendants are immune from plaintiff's claims.

## VII. CONCLUSION

Plaintiff is unable to present any evidence, whatsoever, to put into dispute the existence of probable cause to arrest plaintiff for theft. Plaintiff's claims therefore fail as a matter of law. Moreover, plaintiff's § 1983 claim against the City of Seattle fails because he is unable to demonstrate that a policy or custom of the City cause the alleged wrong. In any event, the City Defendants are entitled to qualified immunity. For all of the reasons set forth above, City Defendants request that the plaintiff's Complaint be dismissed with prejudice.

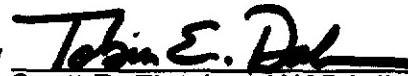
**CITY DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OF DISMISSAL - 14**

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1 DATED this 20<sup>th</sup> day of September, 2001.

2 STAFFORD FREY COOPER

3 By

4   
5 Scott D Fletcher, WSBA # 23150  
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7 Attorneys for City Defendants

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**Certificate of Service**

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF DISMISSAL on the following individual(s)

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Via Facsimile  
 Via Mail  
 Via Messenger

DATED this 20 day of September, 2001, at Seattle, Washington.

Brina Carranza

**CITY DEFENDANTS' MOTION FOR  
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